After the two articles had taken center stage, the Government's counsel, Michael L. Harper, filed a document titled Notification of Alleged Perjury & False Information ("Notification" or "Harper document") on May 14, 2002. In his report, Mr. Harper alleged that he had had a "chance encounter" with Mr. Hysi's prior counsel, Larry J. Hagen, who had conceded to Harper that Mr. Hysi had committed perjury regarding the articles because Mr. Hysi had confessed that he was not the author of the articles. Hagen filed a response to Harper's report. However, Hagen's response was absent from the official administrative record when the Government filed it in the Seventh Circuit.

When Mr. and Mrs. Hysi reacted to the Government's argument in its Response before the Seventh Circuit that Mr. Hysi had not refuted Mr. Harper's allegations, by filing Hagen's response, the Government moved to strike Hagen's Response arguing that it was not part of the administrative record. *See Hysi*, 355 F.3d at 854 ("Curiously, the document bears the file stamp of the Department of Justice Executive Office for Immigration Review and is stamped with the date June 12, 2002, well before the IJ issued her opinion. Yet the government argues that this document is extra-record evidence that was not part of the administrative record.").

REASONS FOR GRANTING THE PETITION

1. **The Court should grant the petition for a writ of *certiorari* because the Seventh Circuit's decision in this case is in**

conflict with that court's own rule in *Kourski v. Ashcroft*, 355 F.3d 1038, 1039–40 (7th Cir. 2004). *Kourski* requires proof in the record that Mr. Hysi, charged with filing the two altered documents, knew that the documents had been altered when he filed them before the documents can be used as a basis to reject his entire case on an adverse credibility determination.

To hold that filing two articles fraudulently altered after publication to add Mr. Hysi's name as author seriously undermines Mr. Hysi's entire case requires proof that Mr. Hysi knew when he filed those articles that they were altered or had reason to suspect that they had been tampered with. While it is tempting to ask how Mr. Hysi could not have known that the articles had been altered, it is the proponent of the proposition that he knew who must produce the facts supporting the conclusion that Mr. Hysi knew the articles to have been tampered with when he filed them.

No such fact exists in this record. Nothing in this record supports the conclusion that Mr. Hysi even suspected that the two articles he presented in support of his asylum claim were altered.

In addition, contrary to the IJ's conclusion, the FDL did not conclude that the articles were "fraudulent." The FDL found that (1) the author attributions had been added after publication, and (2) one article had been damaged during removal of text originally where the author attribution appears.

The IJ was, therefore, objectively wrong to hold that Mr. Hysi's case was not meaningfully different from *Matter of O-*

D–. *O–D–*, which the IJ invoked to dismiss Mr. Hysi's entire claim, is inapposite here because of factual distinctions. In *O–D–*, the alien presented a passport he was later shown to have known was fraudulent, which the alien had presented in his effort to prove that he was a national of the issuing country. *See* 21 I. & N. Dec. at 1084.

Nothing of the sort is in evidence here. It is true that Mr. Hysi presented the articles in question. It is also true that the articles were later found to have been altered after publication. However, it is not true that the record shows that Mr. Hysi is not the two articles' author. It is also not true that Mr. Hysi has been shown to have altered the documents or, which is of critical importance here, was aware or should have suspected that the articles were not genuine.

There is no evidence in this record that Mr. Hysi had seen any version of the articles other than what he filed. Mr. Hysi wrote two articles while in the United States visiting his cousin. He sent the two articles to the newspapers via facsimile transmission. Mr. Hysi did not return to Albania until September of 1996, after the two articles had been published in their respective newspapers. It is, therefore, not logical or fair to hold that

> "The IJ was entitled to infer that Hysi or someone acting on his behalf altered the articles, and that the articles were altered because they would not have supported Hysi's claim in their original form. Adding or changing the author attribution impugned Hysi's credibility on an issue central to his claim. The IJ was therefore entitled to discount his remaining testimony as well."

Hysi, 411 F.3d at 852–53.

The Seventh Circuit's above conclusion is part of a syllogism employing false premises: that the heart of Mr. Hysi's entire case are the two articles; and that Hysi testified that those two articles are the only evidence he presented which is relevant to his claim. *See Id.* That is a clear distortion of Mr. Hysi's testimony which, more accurately interpreted, is that of all the articles he had written, the two articles in question were *the only articles* relevant to his asylum claim.

Were the IJ's inferences and the Seventh Circuit's reading of Mr. Hysi's testimony accurate, one wonders why Mr. Hysi would have adduced the remainder of the evidence in this record. The Seventh Circuit certainly does not propose how to dispose of the rest of the evidence including the medical report the IJ stated would prove Mr. Hysi's case if it turned out to be authentic.

Clearly, the articles were an important facet of Mr. Hysi's claim, but they were not the only facet. Mr. Hysi's claim has other facets supported by the other evidence in the record. For the Seventh Circuit's holding to work, one has to ignore the other evidence in addition to the host of facts and chronology of the events in Mr. Hysi's testimony.

For instance, Mr. Hysi testified that he was first physically attacked in May of 1996 when four men he recognized from his days in the Berisha government abducted him into the mountains where they beat and left him unconscious. That was at least three months before publication of the two articles in question.

Both the IJ and Seventh Circuit seem oblivious of that attack and seem to believe that Mr. Hysi was first physically

attacked after his detention upon return to Albania in September of 1996. Like the IJ, the Seventh Circuit does not seem to consider the attack in May of 1996 as part of the case, but fails to explain why.

> "The heart of Hysi's claim is that he published two newspaper articles critical of the Berisha government and that as a result of these articles, he was detained, interrogated and beaten. He claims that because he continued his political activities *after this initial detention and beating*, he was kidnaped [sic], beaten again and threatened that he would be 'physically eliminated' if he continued his political activities."

See Hysi, 411 F.3d at 852 (emphasis added). The detention upon return to Albania was the second occasion on which the authorities or their supporters used violence against Mr. Hysi.

The Seventh Circuit also endorses the IJ's minimization of Hysi's firing from the government. The IJ held those firings to not be severe enough to rise to being persecution. It is, however, clear that they were in retaliation for Mr. Hysi's expression of opposition to acts by agents and supporters of the Albanian government. Neither the IJ nor the Seventh Circuit explains why retaliation leveled against a perceived opponent for his opposition in a political context is not persecution.

Mr. Hysi spoke at DP gatherings about how he had been mistreated. His act of speaking out at public gatherings, distinct and apart from his writing of articles, resulted in persecution. That is also a separate facet of the evidence substantiating the "on account of" element of his claim. Therefore, holding as the Seventh Circuit does that Mr.

Hysi's whole claim rises and falls with his publishing of the two articles in question is objectively wrong. To reach it, that court had to ignore a host of significant facts of record.

The Seventh Circuit over-eagerly embraced the IJ's illogical conclusions. The IJ had had to skip essential steps in the logical inquiry about the two articles in order to reach her decision. For instance, the IJ failed to inquire whether, other than the addition of the author attributions, the articles themselves were genuine or forgeries. The IJ also failed to inquire whether Mr. Hysi had committed the alterations himself. The IJ merely assumed, and the Seventh Circuit concurred, that Mr. Hysi or someone acting on his behalf had made the alterations because the articles would not be perceived as his without the author attributions. *See Hysi*, 411 F.3d at 852-53.

The Seventh Circuit may be empowered to surmise in the face of unexplained issues, but it is not empowered to ignore the rules in its own precedents. The Seventh Circuit's rule is that presenting a document which turns out to be fraudulent is not necessarily fatal to an asylum claim, *see Kourski*, 355 F.3d at 1039-40, if the record contains no evidence that the alien knew that the document was fraudulent when he filed it and the IJ cannot, therefore, rely on that document to invoke *Matter of O-D-* to discount the alien's entire claim. *See Kourski*, 355 F.3d at 1040.

The Seventh Circuit clearly erred in this case when it held that the IJ rightly rejected Mr. Hysi's entire testimony, and evidence that whether the IJ rightly concluded that Mr. Hysi had altered the articles himself is irrelevant. The Seventh

Circuit also erred in holding that Mr. Hysi had the obligation to prove that he had authored the articles and needed corroboration for his testimony simply because of the altered articles. *See Hysi*, 411 F.3d at 853. *But see Kourski*, 355 F.3d at 1050 ("Ignored is the fact that if the applicant has no reason to know that the document is forged, its existence does not undermine his credibility, though it deprives his testimony of the extra boost to credibility that it would have if it were corroborated.").

> "The testimony is neither corroborated nor undermined by a forgery of which he had, so far as appears, no knowledge.
>
> "The mistake is repeated in the immigration service's brief in this court, which states that because 'Kourski's birth certificate was counterfeit, which was the only documentary evidence in the record that Kourski was Jewish, the IJ understandably found that he was not a credible witness.' That would have been a legitimate finding only if there were reason to believe that Kourski knew or suspected that the birth certificate had been forged. Of course, even if he forged it himself, this would not prove that he was not Jewish, as it is not unknown for persons who have valid claims but no evidence to support it to forge some evidence. But the immigration judge wouldn't have to accept such an argument. Without reason to believe that Kourski knew or suspected the forgery, however, proof that it was a forgery wouldn't be evidence that he was lying.
>
> "At the argument in this court, the government's lawyer said that Kourski 'must have known' the birth certificate was a forgery. She gave no reason for this assertion, and, more important, neither the immigration judge nor the Board of Immigration Appeals found that Kourski 'must have known,' or even have suspected, that the birth certificate was a forgery."

Id., at 1039-40.

This Court should grant *certiorari* in this case because the Seventh Circuit's decision is in conflict with its own precedent. *See Id.*

II. The Court should grant *certiorari* in this case because the decision of the Seventh Circuit is in conflict with this Court's precedent in *SEC v. Chenery Corp.*, 332 U.S. 194(1947) forbidding *post hoc* rationalization of agency decisions. The Seventh Circuit held that the Immigration Judge did not rely on the Harper document to reach her conclusions, notwithstanding the Immigration Judge's express statement that she would give that document minimal, meaning at least some, weight.

The Seventh Circuit's decision declares that it is readily apparent that the IJ did not rely on Mr. Harper's allegations that Mr. Hagen, Mr. Hysi's prior counsel, had intimated to Harper that Mr. Hysi had confessed that the articles were not his. *See Hysi*, 411 F.3d at 854. How the Seventh Circuit knows that the IJ did not rely on the Harper document is perplexing because the IJ expressly stated, among other things, that the Harper document reports that

> "[Mr. Hysi's] counsel informed the Service's counsel that he was 'right on the money' about the articles in question. Specifically, [Mr. Hysi's] counsel allegedly stated that [Mr. Hysi] confessed that he did not write the articles. [Mr. Hysi], however, was not allowed an opportunity to refute this statement, therefore the Court will give this Notification minimal weight."

IJ Decision footnote 4, Appendix at 23.

The Seventh Circuit does not explain how or why it is readily apparent that the IJ who stated she would give the Harper document minimal weight did not rely on it at all in arriving at her conclusions. Nothing in the IJ's decision, before or after footnote 4, suggests that the IJ's definition of "minimal weight" is "no weight at all." Immigration proceedings are not so peculiar that the IJ's express statement, using words out of the English lexicon, should not be understood through the plain and ordinary meaning of the words the IJ uses. *Compare* [minimal means] "relating to or being minimum...the least possible...barely adequate...very small or slight." *Merriam-Webster's Collegiate Dictionary* at 739 (10th ed. 2001), *with* [no means] "not any." *Id.*, at 784.

It is clear that the Seventh Circuit violated this Court's rule forbidding *post hoc* rationalization of agency decisions. *See Gattem v. Gonzales*, 412 F.3d 758, 768 (7th Cir. 2005) ("The Justice Department's lawyers are not allowed to supply the agency's missing rationale in its brief--nor are we.") (Posner, SJ, *dissenting*), citing *Chenery Corp.*, 332 U.S. 194 (1947). The Seventh Circuit was required to treat the record as filed and to take the IJ at her word. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). *See also* 8 U.S.C. §1252(b)(4)(A) (review should be only on the record from the Agency).

The Harper document is inflammatory. If credibility is paramount, petitioners were entitled to their shot at Mr. Harper's before his allegations got the consideration, albeit minimal, the IJ gave them.

CONCLUSION

The Court should grant the petitioner's petition for a writ of certiorari and should reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

Date: 10/03/2005

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In the
United States Court of Appeals
For the Seventh Circuit

No. 04-2572

ERMAND HYSI and MIRELA HYSI,
Petitioners,

v.

ALBERTO R. GONZALES,
Respondent.

On Petition for Review of an Order of
the Board of Immigration Appeals.
No. A 75 320 668 and No. A 75 320 670

ARGUED JANUARY 13, 2005—DECIDED JUNE 15, 2005

Before ROVNER, EVANS and SYKES, *Circuit Judges.*

ROVNER, *Circuit Judge.* Ermand Hysi ("Hysi") and his wife, Mirela, are citizens of Albania. Hysi overstayed his visa while visiting the United States and Mirela arrived here without any valid entry documents. When the Immigration and Naturalization Service ("INS") began

proceedings to remove them, Hysi sought asylum, withholding of removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), and in the alternative, voluntary departure. Mirela's claims are derivative of Ermand's and thus the focus of the appeal is exclusively on Ermand Hysi's claims. An Immigration Judge ("IJ") found that Hysi lacked credible evidence to support his claims and therefore denied Hysi's applications for asylum and withholding of removal as well as his request for voluntary departure. Instead, the IJ ordered the removal of Ermand and Mirela Hysi to Albania. The Board of Immigration Appeals ("BIA") summarily affirmed the IJ's decision and we now affirm as well.

I.

Hysi arrived in the United States in late November 1996 as a non-immigrant visitor with authorization to remain here until June 14, 1997. Rather than leaving at the appointed time, Hysi remained and in July 1997, he filed an application for asylum with the INS. The INS referred the application to the immigration court and charged Hysi with removability as an alien who remained in the United States for a time longer than permitted. *See* 8 U.S.C. § 1227(a)(1)(B). At a preliminary hearing, Hysi admitted the factual allegations against him and conceded that he was removable. He petitioned the court for asylum, withholding of removal under the Convention Against Torture and, in the alternative, voluntary departure.

The IJ held a hearing at which Hysi presented testimony, documentary evidence and an expert witness in support of his claims. Hysi testified that his family opposed the communist regime in Albania, and that after democratically elected

President Berisha came into power, he went to work for the Berisha government. His job involved filing and archiving documents, and maintaining the personnel files of people working for the administration. He also managed employees with housekeeping, cleaning and utilities duties. Hysi believed that people who had worked for the communist regime should not be hired to work in the Berisha-led government, but his manager disagreed. Hysi had other conflicts with his manager and was fired from his job in 1996 due to, he claims, his outspokenness.

Hysi testified that he filed a complaint seeking to get his job back but that complaint was reviewed by the same person who had fired him and thus was denied. He then filed a complaint with the High Court of Albania that was also denied. Hysi did not retain copies of these complaints and thus had no documentary evidence to support this part of his account. In addition to his job with the Berisha administration, Hysi worked about once a month on a committee responsible for returning to the original owners land and property that had been seized by the communist regime. Hysi's job was to review claims for property, verify which claims were legitimate and then recommend to the committee chairman whether the property in question should be returned to the claimant. Hysi averred that he was unable to help anyone retrieve their property because the committee chairman would instead give the property to people who paid bribes or were high ranking government officials. After he lost his job with the Berisha administration, Hysi was also removed from the committee.

In January 1996, after losing both positions, Hysi stated

that he went to work for the Right Democratic Party (known in Albania as the "PDD") and also became a member. In conjunction with the PDD, Hysi was paid to write articles for publication. Hysi claimed he wrote articles that criticized the Democratic Party and as a result he was physically attacked. In late May 1996, he testified, four men kidnapped him, took him to a mountain and beat him. He believed the men worked in the Berisha administration. According to Hysi, the men warned him that if he continued to speak or write against the Democratic Party, he would be "in a lot more trouble." Hysi testified that he was beaten into unconsciousness by these men and that passersby later helped him return home. He did not seek medical attention for his injuries.

After this attack, Hysi testified, he visited the United States. During his stay here, he wrote two political articles which discussed the manipulation of upcoming Albanian elections by the Democratic Party and the Socialist Party. He faxed these articles to Albania where they were published in two different newspapers in August 1996. Hysi testified that these two newspapers were both published by PDD members and that the publication of his articles in these newspapers proved his membership in PDD. Hysi testified that he lost all of his identification cards when he lost his wallet on the airplane during his trip to the United States in November 1996 and thus his only proof of membership in PDD was the two articles published in PDD newspapers. He submitted these articles in support of his application for asylum. He testified that, although he wrote other articles about the government, he submitted these two with his application for asylum because he thought these were "the only ones that have to do with the case." Tr. at 150. He confirmed, when

asked, that none of his other articles had caused him problems with the government.

Hysi testified that he returned to Albania in September 1996 and that in October of that year, he was interrogated and held in the prosecutor's office under the pretext that he had offended President Berisha. He was beaten and then released after being held two days. He nonetheless continued his political activities after this attack, but after the November elections, the same four men who had kidnapped him earlier, kidnapped him again. He testified that this time his attackers beat him and told him that if he continued his political activities he would be "physically eliminated." He told the IJ that he required a one-week stay in a hospital after this beating, and he provided documentation of the hospital stay. After his release from the hospital, he and his family decided that it was best for him to return to the United States. At the end of November 1996, Hysi returned to the United States. After his departure from Albania, Hysi testified, his wife was pressured and threatened by people who told her that Hysi would be harmed if he returned to Albania. Although his wife could not say who these people were, she was frightened and decided to come to the United States as well. She arrived in the United States in August 1997.

On cross-examination, the INS questioned Hysi about the authenticity of the newspaper articles that were the center of his claim of persecution. The INS had the original prints of the articles that Hysi had submitted in support of his asylum claim, and the INS attorney pointed out that Hysi's name appeared to be in a different typeface than the rest of the article, and was printed in bold unlike other printing on

the page. The IJ examined the newspapers and noted that parts of the paper containing Hysi's name were translucent but the rest of the newspaper was not. The INS attorney asked Hysi if his name had been stamped on the page after publication. Hysi's response to these discrepancies was that he was in fact the author of these articles. While the hearing proceeded, the IJ's law clerk attempted to verify the authenticity of the articles by contacting the Library of Congress and by searching the internet. At the close of evidence, the IJ returned to the issue because the clerk had been unable to verify the true author of the articles.

Hysi's counsel complained that the INS had these documents for a lengthy time without having them analyzed and suggested that the articles be submitted for evaluation. Hysi's lawyer pointed out that neither the attorneys present nor the IJ were experts who could determine the authenticity of Hysi's name on the newspapers. The IJ consequently sent both newspaper articles to the INS Forensic Document Laboratory ("FDL") to determine whether they were forgeries. The IJ set the case for status six months hence, noting that she would not be present at that time:

> I don't anticipate that I'll be here, but I'm going to leave specific instructions for the next Immigration Judge, because I'm of the opinion that if in fact these documents are legitimate and the hospital document is found to be legitimate with no alterations, nothing fraudulent whatsoever about the document, I think that the respondent has met his burden in establishing eligibility for the relief requested. However, on the other hand, if anything whatsoever is found to be fraudulent about these documents, that taints the entire claim, and in that case, I don't think anything the respondent said can be believed,

> and it should be denied. And those are the instructions I'm going to leave the next Immigration Judge. Okay.

Tr. at 176-77.

In addition to his own testimony, Hysi presented an expert witness, Prenk Camaj, who testified that he had interviewed government officials in Albania regarding Hysi. Camaj testified that he spoke to the deputy chief judge of the Albania Supreme Court, the commander of presidential security for Albania during the Berisha administration, the general in charge of all of all departments related to security, and the minister of the interior. From these sources, Camaj learned that Hysi would be persecuted on his return to Albania because of the two articles he wrote about the Berisha government. He also testified that one of these sources told him that the government had a "very big file" on Hysi and that Hysi was "hunted" by security forces. Camaj was unable to verify the authenticity of the articles Hysi claimed to have authored but he noted the articles were very critical of the Berisha government and that Hysi would be killed if he returned to Albania because of his political views.

Six months later, the parties returned to court on the status set by the IJ. As predicted, a new IJ presided, and Hysi was present and represented by substitute counsel, who was standing in that day for his regular attorney. After noting that the matter had been set for status based on a suspicion of fraud having been committed in the supporting documents, the IJ noted that she had received the report from the FDL indicating that someone had indeed tampered with both newspaper articles. The IJ indicated that she intended to

issue a written decision based on this additional evidence, and asked Hysi's substitute attorney to tell his regular counsel the plan of action, noting that if a written decision was not the right course of action, she would "recalendar" the case again. After asking Hysi's counsel whether there was anything further (he replied "No, Your Honor"), she closed the matter for written decision. Hearing nothing further from any of the parties, the IJ issued the written decision denying Hysi relief approximately five months later.

In the written decision, the IJ noted the FDL's conclusion that the newspaper articles were fraudulent. The FDL examiner remarked that the author attributions accompanying the questioned articles were added to the newspapers after the papers were printed. The examiner opined that the process used to insert the author name after the fact resulted in the text being indented into the surface of the page unlike the other text printed on the page. In addition, the examiner concluded that, for one of the newspaper articles, a previous entry was eradicated from the name area of the text, resulting in damage to the surface of the paper. Because of this forgery, the IJ found that Hysi failed to establish the underlying facts of his claim for asylum by a preponderance of credible, probative evidence. The IJ found specifically that the use of fraudulent documents in making his claim seriously undermined Hysi's credibility and that Hysi failed to provide any convincing explanation for questions regarding the authenticity of the articles. The IJ noted that Hysi simply insisted that he wrote the articles and that they were genuine even when confronted with the obvious differences in typeface that were visible even to the untrained eyes of the IJ and the INS attorney. The IJ found

that because the articles were fraudulent, Hysi's entire claim was suspect. Because Hysi lacked credible proof that he wrote the articles, the IJ discounted Hysi's claim that he suffered persecution on account of the articles. The only other mistreatment Hysi alleged was being fired from his job, which the IJ found was insufficient to establish persecution. The IJ gave minimal weight to the opinions of the expert witness because the expert had relied for many of his conclusions on Hysi's representation that he had written the articles and was known in Albania to be the author. Accordingly, the IJ denied Hysi's claim for asylum. The IJ similarly rejected Hysi's claim for withholding of removal, which has a more stringent standard than the asylum claim, and also denied his claim for relief under the Convention Against Torture, again for lack of credible evidence. The IJ found that Hysi was ineligible for voluntary departure and thus ordered that he and his wife be removed to Albania. Hysi appealed to the Board of Immigration Appeals, which affirmed, without opinion, the results of the decision below. Hysi then appealed to this court.

II.

In his appeal, Hysi challenges the IJ's adverse credibility finding, arguing that the IJ erred because there was no evidence supporting a finding that he altered the newspaper articles and because his testimony was corroborated by the expert witness. Hysi also complains that the IJ improperly accorded weight to a statement his counsel made to an INS attorney after the original hearing but before final status when the IJ closed the case for evidence. Because the BIA affirmed summarily, that is, without issuing a separate opinion, we review the decision of the immigration judge

directly to determine if it is supported by substantial evidence. *Tolosa v. Ashcroft*, 384 F.3d 906, 908 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609, 612 (7th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962, 966-67 (7th Cir. 2003).

A.

We will affirm the IJ's decision if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Only where the evidence in support of the application is so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution will we reverse a decision for lack of evidence. *Elias-Zacarias*, 502 U.S. at 483-84; *Georgis*, 328 F.3d at 967. To qualify for Asylum, Hysi bore the burden of showing that he suffered past persecution or has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A); *Ememe v. Ashcroft*, 358 F.3d 446, 450 (7thCir. 2004). A petitioner's experience of past persecution gives rise to a rebuttable presumption that he will face future persecution. 8 C.F.R. § 208.13(b)(1)(i); *see, e.g., Oforji*, 354 F.3d at 613.

We give great deference to an IJ's credibility determinations so long as they are supported by cogent reasons that bear a legitimate nexus to the finding. *Tolosa*, 384 F.3d at 909. We will reverse an IJ's credibility findings only in extraordinary circumstances. *Tolosa*, 384 F.3d at 909. The IJ found that Hysi was not a credible witness because the FDL determined that the author attributions in the news paper articles were added after publication and, in one of the papers, other text had been erased from the author name

area on the page before Hysi's name had been added on top of it. Because the newspaper articles were so central to Hysi's asylum claim and because the articles were altered, the IJ declined to believe Hysi's testimony.

This is not a case involving extraordinary circumstances. The heart of Hysi's claim is that he published two newspaper articles critical of the Berisha government and that as a result of these articles, he was detained, interrogated and beaten. He claims that because he continued his political activities after this initial detention and beating, he was kidnapped, beaten again and threatened that he would be "physically eliminated" if he continued his political activities. Moreover, Hysi relies on the articles as proof of his membership in the PDD. Indeed, Hysi testified that the articles were the only evidence he had of his membership in the PDD, having lost his identification cards while traveling to the United States. If Hysi did not, in fact, publish these two articles, the very articles that he testified were the only ones relevant to his claim, then he would be hard pressed to argue that the government persecuted him because of the articles. Moreover, if the articles were fraudulent, the only remaining proof of Hysi's membership in PDD is Hysi's own testimony. The IJ was entitled to infer that Hysi or someone acting on his behalf altered the articles, and that the articles were altered because they would not have supported Hysi's claim in their original form. Adding or changing the author attribution impugned Hysi's credibility on an issue central to his claim. The IJ was therefore entitled to discount his remaining testimony as well.

Hysi argues that other evidence in the record supports his claim that he was persecuted because of his political beliefs

and activities. He points to his expert witness, Camaj, who testified that he interviewed government officials in Albania who verified that Hysi has a "very big file" with the government and that he would be hunted by security forces and killed if he returned to Albania. The IJ reasonably discounted this testimony because it was based in part on the expert's belief that Hysi authored the articles in question and his belief that Hysi was known in Albania as the author of the articles. Hysi argues that although someone altered the newspaper articles, there is no evidence in the record that he is the person who committed the forgery and no evidence that he was not the author of the articles. Again, though, the IJ reasonably inferred that Hysi altered the articles he submitted to the INS. Hysi bore the burden of proving by a preponderance of the evidence that he suffered persecution because of his political beliefs. His argument that there is no evidence he did not author the articles is thus irrelevant. He bore the burden of demonstrating that he did author the articles that were the basis of the government's displeasure with him and he failed to establish this fact with credible evidence.

Finally, Hysi complains that he was not given an opportunity to rebut the report from the FDL. We reject this claim as well. First, at the hearing where Hysi was questioned about the authenticity of the articles, Hysi's own attorney agreed that the FDL was the appropriate entity to examine the articles. Hysi's counsel did not request an opportunity to have another expert provide an independent report. At the status hearing where the report was received into evidence, the IJ clearly told Hysi's substitute counsel that a written opinion would be issued unless she heard

anything further from the parties. Hysi's lawyer did not ask for an independent examination of the documents then or at any time thereafter. Hysi cannot complain at this late date that he wished to hire an independent examiner to refute the FDL's conclusions about the newspaper articles, having foregone numerous opportunities to do so while the case was still before the IJ. We find no error in the IJ's conclusion that the author attributions for the newspaper articles were fraudulently added after the fact. Because the articles were central to Hysi's claim that he was persecuted for his political views and membership in the PDD, the IJ was entitled to find that Hysi was generally not a credible witness. In short, the record evidence does not compel us to find the requisite fear of persecution and the IJ's conclusions are supported by substantial evidence. We therefore deny the Petition for Review of Hysi's asylum claim.

Having failed to meet the more lenient burden of proof for asylum, Hysi cannot establish that he is entitled to withholding of removal under 8 U.S.C. § 1231(b)(3) and 8 C.F.R. § 1208.16(c)(2). Nor can he establish eligibility for protection under the Convention Against Torture. *Ahmed v. Ashcroft*, 348 F.3d 611, 615 (7th Cir. 2003) (an applicant who fails to establish eligibility for asylum necessarily cannot satisfy the more stringent requirements for withholding of removal under 8 U.S.C. § 1231(b)(3), nor the requirements for withholding of removal under the Convention Against Torture). We thus deny the Petition for Review in its entirety.

B.

After the initial hearing but before the IJ closed the case for evidence, the INS filed with the immigration court a "Notification of Alleged Perjury and False Information"

("Notification"). The Notification recounted that Hysi provided the INS with original copies of two newspaper articles when he applied for asylum and then submitted photocopies in support of his testimony at the hearing. The Notification stated that the IJ had submitted the original newspaper articles to the FDL after their authenticity was called into question during the hearing. Following that hearing, according to the Notification, the INS attorney encountered Hysi's counsel and reported the following:

> On April 12, 2002, I had a chance encounter with counsel for the respondent. Counsel informed me that I was "right on the money" about the articles in question. Specifically, he stated that the respondent informed him that he did not write the articles. Counsel further advised me that he did not have this knowledge prior to the respondent's confession.

R. at 416-18 (footnote omitted).

Having notified the court about this conversation, the INS requested that the IJ take "appropriate action." In the IJ's opinion, she stated that because Hysi had not been given an opportunity to refute the allegations in the Notification, she would give the Notification "minimal weight." In his appeal, Hysi challenges whether the IJ could properly give *any* weight to the Notification without violating Hysi's due process rights because Hysi had no opportunity to cross-examine the INS attorney regarding the allegations. Hysi attached his lawyer's response to the Notification to his reply brief (Hysi's lawyer has an entirely different account of that conversation) and the government moved to strike it because

it was not part of the record below. Curiously, the document bears the file stamp of the Department of Justice Executive Office for Immigration Review and is stamped with the date June 12, 2002, well before the IJ issued her opinion. Yet the government argues that this document is extra-record evidence that was not part of the administrative record. This is a mystery that we need not solve. In reviewing the IJ's decision, it is readily apparent that when the IJ said she would give the Notification "minimal weight," she meant "no weight." The IJ did not rely on the Notification at all in reaching her decision, relying instead on the report of the FDL in finding that Hysi lacked credibility. The mysterious response from Hysi's counsel thus becomes irrelevant. The IJ considered neither document and this court has given no weight to either document. The motion to strike is therefore denied as moot.

PETITION FOR REVIEW DENIED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File: A75-320-668
A75-320-670

Date: March 19, 2003

In the Matter of:

Ermand Hysi,
Mirela Hysi

Respondents.

IN REMOVAL PROCEEDINGS

Charges: Section 237(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(B) — Alien remained in the United States for a time longer than permitted.

Section 237(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(A) — Alien not in possession of a valid entry document.

APPLICATIONS: Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) — Asylum.

Section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) — Withholding of Removal.

Section 208.16, Chapter 8 of the Code of Federal Regulation — Withholding of Removal under Article 3 of the Convention Against Torture.

Section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b) — Voluntary Departure.

ON BEHALF OF THE RESPONDENT:
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ON BEHALF OF THE DEPT. OF HOMELAND SECURITY:
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. BACKGROUND

The respondents are natives and citizens of Albania. The lead respondent was admitted to the United States on or about November 28, 1996 as a nonimmigrant visitor for pleasure with authorization to remain in the United States for a temporary period not to exceed June 14, 1997. On July 17, 1997, the respondent filed an application for asylum with the Immigration and Naturalization Service ("Service"),[1] listing his wife as a derivative. See Group Exhibit 2. The respondent's wife was admitted to the United States on or about August 20, 1997, and did not possess or present a valid entry document. On August 27, 1997, the Service initiated removal proceedings against the respondents by filing Notices to Appear ("NTA"), charging that the lead respondent is removable from the United States under section 237(a)(1)(B) of the Immigration and Nationality Act ("Act"), for remaining in the United States longer than permitted, and that his wife is removable from the United States under section 237(a)(1)(A) of the Act, for failure to possess a valid entry document. See Exhibits 1 & 1A.

At a hearing on September 30, 1997, the respondents admitted the factual allegations contained in the NTA and conceded removability. Thus, the Court finds that removability has been established by clear and convincing evidence

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[1] As of March 1, 2003, the Service was decommissioned and its functions have been assumed by the Department of Homeland Security.

as required by the Act. See INA § 240(c)(3)(A); 8 C.F.R. § 240.8(a); Cf. Woodby v. INS, 385 U.S. 276, 286 (1966). The respondents declined to designate a country for removal; thus, pursuant to section 241(b)(2)(C) of the Act, the Court designates Albania, the country of which the respondents are natives and citizens. The lead respondent has requested and filed applications for the following forms of relief: asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), and in the alternative, voluntary departure, listing his wife as a derivative.

II. THE RESPONDENTS' CASE

A. Documentary Evidence

A number of documents relevant to the merits of the lead respondent's request were entered into the record as the following exhibits: Exhibit 1, the August 27, 1997 NTA for the lead respondent; Exhibit 1A, the August 27, 1997 NTA for the lead respondent's wife; Group Exhibit 2, the lead respondent's Application for Asylum and Withholding of Removal (Form I–589) and supporting documents; Exhibit 3, Affidavit of expert witness, Prenk Camaj; Exhibit 4, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Albania — Profile of Asylum Claims and Country Conditions (Sept. 1997) (hereinafter Profile of Asylum Claims); Exhibit 5, British Helsinki Human Rights Group, Albania 1998: Former Political Prisoners on Hungerstrike (1998); Exhibit 6, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Albania — 2001 Country Reports on Human Rights Practices (2002) (hereinafter 2001 Country Report).

B. Testimonial Evidence

1. The Lead Respondent's Testimony

The lead respondent testified that he was born in Albania on April 12, 1964. He and his wife have one eight–year old son who was born in Tirana, Albania. His mother, father, and brother live in Albania. He testified that the government constantly bothers his father. His brother–in–law and three first cousins live in the United States.

According to the lead respondent, he was mistreated by the government in Albania. He stated that in March of 1993, he began working as an employee at the administration of the Berisha government. See Group Exhibit 2 (Certificate verifying that the lead respondent worked for the administration of the presidency from 1993 until 1995). He explained that his duties included filing and archiving some of the personnel documents and maintaining the protocol for the personnel of the institution. Although he was the manager of the persons responsible for maintaining the building he was not responsible for hiring or firing employees. The lead respondent testified that he had problems with is supervisor. The lead respondent believed that people who had worked for the communist regime should not work for the democratic government; however, his superior did not agree. Because he spoke out, he was fired.[2]

In May of 1993, the lead respondent started working part time (once a month) for the committee for redirecting private property to its rightful owners. See Group Exhibit 2 (Certificate verifying that the lead respondent was a member of the Board for the redirection and the compensation of the properties from 1993 until 1995). When the communist regime came to power, it confiscated all private property; therefore in 1990, when the democratic government came to power, it decided to return the property to its lawful, rightful owners. The lead respondent assisted in evaluating the claims that people submitted requesting their property. The chairman of the committee generally made the decisions, and the lead respondent tended to disagree with him. Instead of returning the property to its owners, the majority of the property went to the people who could bribe the officials or had high ranks in the government. When the lead respondent was fired from the Berisha administration, he was also fired from the committee.

The lead respondent testified that in January of 1996, he joined the right democratic party, which is in opposition to the socialist party. As a member, he wrote articles for the party and was paid for writing the articles. He testified that he was targeted because of these articles.

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[2] The lead respondent testified that he filed a formal complaint with the high court but he did not retain a copy of the filing.

According to the lead respondent, on May 26, 1996, four people abducted him in the street. They took him to the mountains and threatened him, stating that if he continued to write articles, he would face more trouble. The four men then beat him unconscious and left him there. The lead respondent insisted that the four people were familiar as he had seen them while working for the Berisha administration. The lead respondent did not seek medical attention.

The lead respondent testified that he came to the United States in June of 1996 to visit his cousin and to calm down. During the three months he spent in the United States, he wrote two articles that speak about the manipulations of the democratic and socialist parties. He stated that he signed and faxed the articles to Albania and two newspapers, *The Right* and *The Pole of the Center*, published them in August of 1996. See Group Exhibit 2 (Ermand Hysi, Berisha Dances in the Threshold of the Wolf's Open Mouth, *The Right*, Aug. 7, 1996; Ermand Hysi, Two Different Alternatives for Elections, *The Pole of the Center*, Aug. 30, 1996). According to the lead respondent, *The Right* is the newspaper of the Right Democratic Party.

The lead respondent stated that he returned to Albania in September of 1996 and on October 16 and 17, 1996, he was interrogated, detained, and beaten. After this incident, he testified that he continued to be involved in the political process. He wanted to reveal the real face of the democratic party and began speaking at meetings held by the Right Democratic Party about his mistreatment.

According to the lead respondent, on November 10, 1996, the same people that beat him in May of 1996 beat him again. They warned him that if he continued his political activities, he would be killed. He testified that after the assault, he was admitted to the hospital and remained approximately one week. See Group Exhibit 2 (Certificate from University Hospital Center of Tirana, certifying that "Mr. Ermand Hysi was hospitalized at the Civil Hospital for physic injury from November 10, 1996 to November 16, 1996"). He stated that he then came to the United States in late November of 1996.

The lead respondent testified that after he left Albania, his wife was pressured and threatened. People told her that if he returned to Albania, he

would be harmed. His wife was very frightened and scared and therefore she came to the United States also. The lead respondent testified that if he returns to Albania he will be killed or disappeared.

On cross examination, the lead respondent explained that he was last in Albania from September until November of 1996. When asked why he returned to Albania in September of 1996, the lead respondent testified that he believed the situation would be better for him and moreover, he was born in Albania and wanted to live in his native country.

When questioned about the two newspaper articles, the Service noted that the lead respondent's name is in very bold print for both articles, as compared to the regular type of the articles. Moreover, the lead respondent admitted that his name is in considerably darker print than other author's names within the same newspapers. The court noted that in all places, one can see through the page of the newspaper, however in the sections in which the lead respondent's name appeared, one cannot see through the newspaper. The lead respondent testified that he is a member of the Right Democratic Party and that he has written articles for them, included the two submitted to the court.

2. Expert Witness Testimony

Mr. Prenk Camaj testified as an expert in the translation of the Albanian language to the English language on the respondent's behalf.[3] See Group Exhibit 3 (Affidavit of Prenk Camaj). The witness testified that he met and interviewed the lead respondent initially on September 20, 1997, and subsequent to this interview, he spent a significant amount of time with him, including numerous phone calls and meetings. The witness explained that the translator used in the preparation of the lead respondent's asylum application incorrectly translated the application. In the opinion of the expert, the poor translation makes the asylum application very inaccurate and confusing.

The witness also testified that he spoke with various sources regarding the lead respondent's claim, including Zef Nikaj, a deputy chief judge of the supreme court of Albania, who is also the witness' first cousin. The deputy

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[3] The Service stipulated to the witness' qualifications as an expert.

chief judge allegedly knew of the lead respondent because he had worked for the government and because of two articles he wrote regarding the corruption in the regime in Albania. When the witness asked the judge what would happen to the lead respondent if he went before the court, the judge informed him that people like him do not make it to the court because he would be killed before he testifies. The witness also claimed that he spoke with Alfred Tare, the commander of the presidential security for the government during the Berisha regime. Alfred Tare allegedly explained that he knows the lead respondent, although the respondent may not know him. According to the witness, he also spoke with General Halit Gjecaj, cousin of the lead respondent, who was in charge of the country's security during the Berisha regime, and Belul Celo, the Minister of Interior after the riots and problems started in 1997. Belul Celo allegedly checked the lead respondent's file and explained that the respondent has a large file.

The witness stated that he is familiar with the newspaper articles submitted with the lead respondent's asylum application. See Group Exhibit 2. According to the witness, with those articles, the lead respondent made himself a target and if he returns to Albania, he will be killed. From 1991 until the present, the government of Albania has eliminated persons that they fear, including journalists who speak out against the government. The witness testified that this continues with the present government. He asked explained that in the last eighteen months, over 6,000 people have been killed and 90% of those deaths were committed by the security forces. The witness believes that the number of deaths is much higher than that, and may be as many as 10,000 people.

On cross examination, the witness testified that he first saw the newspaper articles when he met the lead respondent. When questioned regarding the *2001 Country Report*, the witness testified that the report is incorrect and that the 1996 elections were not free and fair elections. He insisted that thousands of people are being killed in Albania because of their opposition to the government.

III. SERVICE'S FORENSIC DOCUMENT REPORT

The Service's Forensic Document Laboratory concluded that the lead respondent's newspaper articles allegedly published in *The Right* and *Pole of*

the Center newspapers were fraudulent.[4] See Report of Elaine X. Wooton, Forensic Document Examiner, June 6, 2002. The Forensic Document Examiner stated, "[t]he author attributions accompanying the questioned articles were added to ... [the newspapers] after the newspapers were printed. The process used to insert the names resulted in the text being intended into the surface of the page; the other newspaper text is not indented. In addition, a previous entry was eradicated from the name area of page 2 of ... [*Pole of the Center* newspaper article]; the paper surface was damaged in the process." Id.

IV. ANALYSIS

Under section 208 of the Act, the Attorney General may grant asylum to an alien who is physically present in the United States if the alien meets the statutory definition of a refugee. A refugee is defined as an individual who is unable or unwilling to return to his or her native country "because of persecution or a well–founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A).

In order to establish eligibility for asylum, the respondent has the burden of demonstrating past persecution or a well–founded fear of future persecution. See INA § 101(a)(42)(A); Matter of Chen, 20 I&N Dec. 16, 17 (BIA 1989); Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985). The statute provides no definition for the phrase "well–founded fear of persecution." Courts have indicated, however, that a respondent can establish a well–founded fear by showing that a reasonable person in his or her circumstances would fear persecution for one of the five grounds specified in the Act. See

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[4] The Service also submitted a Notification of Alleged Perjury & False Information to the Court on May 14, 2002, stating that on April 12, 2002, the respondents' counsel informed the Service's attorney that he was "right on the money" about the articles in question. Specifically, the respondents' counsel allegedly stated that the lead respondent confessed that he did not write the articles. The lead respondent, however, was not allowed an opportunity to refute this statement, therefore the court will give this Notification minimal weight.

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I&N Dec. 439, 440-41 (BIA 1987). An applicant may also establish statutory eligibility for asylum by demonstrating that he or she was persecuted in the past on account of political opinion or any of the other grounds enumerated in the Act for which asylum may be granted. 8 C.F.R. § 208.13(b)(1) (2000); Chen, 20 I&N Dec. at 16. Once past persecution has been established, the applicant is entitled to a presumption of future persecution which can only be overcome by a preponderance of the evidence. Matter of H-, 21 I&N Dec. 337 (BIA 1996). Finally, the respondent must also demonstrate that he merits such relief as a matter of discretion. See In re V-T-S-, 21 I&N Dec. 792, 795 (BIA 1997).

A. CREDIBILITY

At a threshold, the court must consider the lead respondent's credibility in the context of his request for asylum. Underlying his claim for asylum is the contention that he published two newspaper articles in opposition to the current government of Albania and therefore suffered persecution and has a well founded fear of persecution if returned to Albania.

The court attaches significant weight to the credibility of an asylum applicant. See In re O-D-, 21 I&N Dec. 1079 (BIA 1998). An applicant's consistent and detailed testimony can be sufficient to meet the burden of establishing persecution. In re Kasinga, 21 I&N Dec. 357 (BIA 1996); Mogharrabi, 19 I&N Dec. at 445. However, the unavailability of supporting documentary evidence should be adequately explained. See Matter of S-M-J-, 21 I&N Dec. 722, 730 (BIA 1997). Moreover, the immigration judge may make an adverse credibility finding and deny the alien's application for asylum and withholding of removal when (1) there are discrepancies present in the respondent's documentary and testimonial evidence; (2) those inconsistencies and omissions provide good cause to conclude that the respondent's testimony is incredible; and (3) the respondent fails to provide a convincing explanation for those discrepancies. See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998).

Credibility questions surrounding central issues weigh heavily against the respondent's claim. See In re O-D-, 21 I&N Dec. at 1081 ("To inform our deliberations regard the respondent's credibility vis-a-vis his fundamental

claim, we juxtapose his testimony or lack thereof and the documentary evidence or lack thereof"); In re Y–B–, 21 I&N Dec. 1136 (BIA 1998) (holding that an applicant does not meet his or her burden of proof by general and meager testimony). "Credibility involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

In reaching a decision in this case, the Court finds that the lead respondent has failed to establish the underlying facts of his claim by a preponderance of credible, probative evidence especially in light of the Forensic Document Laboratory's conclusion that the newspaper articles, which are central to the respondent's claim, are fraudulent.

The Court finds that the use of fraudulent documents seriously undermines the respondents' credibility. See In re O–D–, 21 I&N Dec. at 1084 (holding that presenting an identification document to the immigration court that is found to be counterfeit by forensic experts not only discredits the asylum applicant's claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicates an overall lack of credibility regarding the entire claim). The instant case is not meaningfully distinguishable from In re O–D–. In this case, the lead respondent submitted fraudulent newspaper articles, which pertain to a central element of his asylum claim, specifically that he suffered past persecution and has a well founded fear of persecution because he published articles in opposition to the current government of Albania. The Service's Forensic Document Laboratory concluded that the articles were fraudulent. Moreover, even before the Service concluded the documents were fraudulent, the Court seriously questioned their authenticity due to the fact that the lead respondent's name appeared in significantly bolder type than other names of authors and because of the inability to see through the sections of the newspapers containing the respondent's name as compared to other sections of the newspaper. The respondent failed to provide a convincing explanation for the questions regarding the authenticity of the newspaper articles. Instead of offering further evidence of their authenticity, the respondent merely insisted that he wrote the articles and that they were genuine. The Court therefore finds that the articles are fraudulent and the respondent's entire claim is suspect. As such, the Court finds the lead respondent not credible.

In light of this credibility finding, the Court finds that the lead respondent has failed to establish that he suffered past persecution or has a well founded fear of persecution if returned to Albania. The respondent testified that he suffered mistreatment because he published articles criticizing the socialist and democratic parties, however considering the articles are fraudulent, the Court has difficulty believing the respondent's claim regarding his mistreatment for publishing such articles. The only other mistreatment that he alleged was being fired from his job at the Berisha administration and the committee for redistributing property. The Court does not find that this termination of employment rises to the level of past persecution.

The lead respondent also testified that he fears he will be persecuted if he returns to Albania because of his political activities. However, the lead respondent's fear of future persecution is undercut by the fact that his mother, father, and brother continue to reside in Albania. Although he stated that the police bother his father, he was unable to provide any specific details regarding his father's mistreatment. In addition, the lead respondent testified that his wife came to the United States shortly after he left Albania, because she was threatened, however he has not submitted any corroborating evidence of the alleged threats. Moreover, the testimony of the expert witness will be given minimal weight because the majority of his conclusions and the conclusions of his alleged sources were based on the respondent's misrepresentation that he published certain articles speaking out against the democratic and socialist parties. Therefore, because the lead respondent has failed to establish past persecution or a well founded fear of persecution by credible evidence, the Court will deny the respondents' request for asylum.

B. WITHHOLDING OF REMOVAL

To be eligible for withholding of removal pursuant to section 241(b)(3) of the Act, the respondent must demonstrate a clear probability of persecution in the country designated for removal on account of race, religion, nationality membership in a particular social group, or political opinion. See INS v. Stevic., 467 U.S. 407 (1984); Mogharrabi, 19 I&N Dec. at 439. This means that the respondent must establish that it is more likely than not that he or she would be subject to persecution for one or more of the enumerated grounds. See Id. The burden of proof required to establish eligibility for asylum is

lower than that required for withholding of removal. See INS v. Cardoza–Fonseca, 480 U.S. 421 (1987).

Because the lead respondent has failed to meet the well–founded fear standard required for asylum, he has necessarily failed to meet the more stringent requirement for a clear probability of persecution required for withholding of removal. As a result, the respondents' applications for withholding of removal will also be denied.

C. WITHHOLDING OF REMOVAL UNDER TORTURE CONVENTION

For asylum applications filed on or after April 1, 1997, an applicant shall also be considered for eligibility for withholding of removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. See 8 C.F.R. § 208.13(c)(1).

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 208.18(a)(1). The severe pain or suffering must be inflicted on the applicant or a third person for one of four persons, specifically: (1) to obtain information or a confession; (2) to punish for an act he or she committed or is suspected of having committed; (3) to intimidate or coerce; or (4) for any reason based on discrimination of any kind. See Id. In addition, in order to constitute "torture," the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 208.18(a)(6). Further, the pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1). "Acquiescence" requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7). Torture is an "extreme form of cruel and inhuman treatment" but does not include pain or suffering arising from lawful sanctions. 8 C.F.R. § 208.18(a)(2), (3). Lawful actions, however, do not include sanctions which defeat the objectives and purpose of the Torture Convention. 8 C.F.R. § 208.18(a)(3).

In order to constitute torture, mental pain or suffering must be "prolonged." 8 C.F.R. § 208.18(a)(4). It also must be caused by or result from intentional or threatened infliction of severe physical pain or suffering, threatened or actual administration of mind altering substances or similar procedures, or threatened imminent death. Id. These causes or results can be directed towards the applicant or another individual. Id.

An applicant for withholding of removal under the Torture Convention bears the burden of proving that it is "more likely than not" that he or she could be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2). As with asylum, this burden can be established by testimony without corroboration if the testimony is credible. See Id. see also Matter of Y–B–, 21 I&N Dec. 1136 (BIA 1998). In assessing whether the applicant has satisfied the burden of proof, the court must consider all evidence relevant to the possibility of future torture, including: "evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and other relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3).

As discussed above, the respondents have failed to establish that they have a well–founded fear of persecution if removed to Albania. Similarly, the respondents have failed to establish that it is more than likely that they will be tortured if removed to Albania. Specifically, the respondents have failed to provide credible evidence of past torture inflicted upon them or their families; or whether they could relocate within the country. Indeed, the lead respondents' parents and brother reside in Albania without being tortured by the authorities. The lead respondent testified that his father is bothered by the authorities, however he did not provide any credible evidence corroborating this statement and was vague regarding how his father was bothered. As such, the respondents' application for withholding of removal under the Torture Convention must be denied.

D. VOLUNTARY DEPARTURE

Section 240B of the Act permits the Attorney General to grant an alien the privilege of voluntary departure if the respondent can establish that: (1)

s/he has been physically present in the United States for a period of at least one year preceding service of the NTA; (2) s/he has been a person of good moral character during the five year period immediately preceding the application for such relief; (3) s/he is not removable under sections 237(a)(2)(A)(iii) or 237(a)(4) of the Act; (4) s/he has the means to depart the United States voluntarily and intends to do so; and (5) s/he merits the relief as a matter of discretion. See INA § 240B(b)(1). Since the respondents were not physically present in the United States for a period of at least one year preceding service of the NTAs, they are ineligible for voluntary departure. The lead respondent entered the United States on or about November 28, 1996, and his NTA was issued on August 27, 1997. See Exhibit 1. The respondent's wife entered the United States on or about August 20, 1997, and her NTA was issued on August 27, 1997. See Exhibit 1A. Thus, the Court must deny the respondents the privilege of voluntarily departing from the United States.

Accordingly, the following orders will be entered:

ORDERS OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERD that the respondents' application for asylum and withholding of removal be DENIED.

IT IS FURTHER ORDERED that the respondents' application for withholding of removal under the Torture Convention be DENIED.

IT IS FURTHER ORDERED that the respondent's requests for voluntary departure be DENIED.

IT IS FURTHER ORDERED that the respondents shall be removed to Albania on the charges contained in their respective Notices to Appear.

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RENETTA SMITH
IMMIGRATION JUDGE